



Memorandum

TO: HONORABLE MAYOR AND
COUNCIL

FROM: William F. Sherry, A.A.E.

**SUBJECT: WEST SIDE DEVELOPMENT
LEASE AGREEMENT CURFEW
PROVISIONS**

DATE: April 5, 2013

Approved

Date

4/8/13

SUPPLEMENTAL

REASON FOR SUPPLEMENTAL

At the time the original memo was submitted, the terms of the lease agreement were under negotiation. While the lease is still under negotiation, the subject additional curfew provisions have been raised by Signature as conditions that cannot be negotiated. In order for Council to make an informed decision on the staff recommendation to negotiate and execute the lease agreement, this information and recommendation is being provided.

BACKGROUND

Curfew Provisions in Existing FBO Leases

All Airport leases include a general provision requiring compliance with all applicable federal, state and local laws. Although this general provision does not specifically refer to the Curfew Ordinance, the Curfew Ordinance is a local law and is therefore covered under the general compliance with law provision. Any violations of the Curfew Ordinance are subject to a \$2,500 fine. In addition, the existing leases with Atlantic Aviation, AvBase and ACM contain additional curfew provisions applicable to the FBOs and their subtenants requiring a degree of compliance that exceeds the Curfew Ordinance. These additional provisions require compliance with the curfew hours at all times during the term of the lease – *even if the Curfew Ordinance is subsequently terminated*. In addition, the provisions give the City the right to evict FBO subtenants for any violation of the curfew. These additional curfew provisions were amended into the three existing west side tenant agreements at a time when the curfew was transitioning from a weight-based program to a noise-based program and, at the time, Council was concerned that the curfew could be invalidated through legal challenge. Since that time, however, the

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curfew has remained in place and has been steadily enforced through general lease provisions requiring compliance with all applicable laws.

However, the existing FBO leases provide that the provisions requiring FBO and subtenant compliance with these additional curfew compliance provisions (compliance with the curfew hours whether or not the Curfew Ordinance is still in effect as well as the authority of the City to evict FBO subtenants for curfew violations) only apply if identical provisions are included in *all* FBO leases at the Airport. Therefore, the additional curfew provisions in the current FBO leases with Atlantic, AvBase and ACM would continue to be enforceable only if they were included in the proposed lease with Signature. It is important to note that since these additional provisions were added to the FBO leases in 2004, the City has not found it necessary to take action to evict any FBO subtenants for curfew violations.

As discussed in the March 20, 2012 staff report to Council, provisions in the commercial airline leases require compliance with all laws, ordinances and regulations. In 2007, the Council considered including additional curfew provisions – similar to those in the existing FBO leases – in the commercial airline leases. However, Council ultimately determined that general lease provisions requiring compliance with all applicable laws were sufficient to obligate the airlines to comply with the Curfew Ordinance. Staff's recommendation in the March 20, 2012 report was to include only a general provision regarding compliance with all laws, ordinances and regulations in the FBO lease, consistent with the airline leases, since in 2007 Council found those requirements sufficient to obligate the airlines to comply with the Curfew Ordinance.

DISCUSSION

Curfew Provisions in the New FBO Lease

As part of its April 3, 2012 direction to staff, Council directed that any new tenant resulting from the RFP become subject to the same provisions that require compliance exceeding the Airport Curfew Ordinance that are currently contained in the leases with the existing FBOs and their subtenants (which require compliance with curfew hours at all times during the term of the lease, even if the curfew ordinance is subsequently terminated and the right of the City to evict FBO subtenants for any violation of the curfew).

Signature and its major subtenant, Blue City Holdings San Jose (BCH), believe the substantial investment of capital and commitment to the community they are prepared to make should be a consideration in the negotiation of lease terms relating to the additional curfew provisions. As a major contributor to the financing of the Signature project, BCH is concerned that the City would have the ability to evict it from the Airport after a single violation of the curfew. Given BCH's concerns as major financial investor, Signature has indicated that it is not willing to move forward with the proposed development and lease if the lease contains the additional curfew requirements that exceed compliance beyond the Curfew Ordinance.

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Conclusion

Signature has indicated that it cannot sign a lease containing the additional curfew provisions because of the risk associated with the substantial capital investment that it plans to make at the Airport. However, Signature will agree to general compliance with law provisions in the lease that are consistent with the airline leases, which Council has previously found sufficient to obligate compliance with the Curfew Ordinance.

Given the: 1) amount of the Signature/BCH project investment (\$82 million); 2) the potential benefits to the Airport and the City (revenue and jobs); 3) BCH's concerns about the additional curfew provisions; and 4) Signature's unwillingness to proceed with the project if the lease contains the additional provisions, staff recommends that Council consider removing the requirement to include additional curfew requirements in the proposed lease with Signature.

Finally, if Council removes the requirement of the additional curfew provisions in the Signature lease, the additional curfew compliance provisions in the existing FBOs agreements (Atlantic Aviation, AvBase and ACM) will no longer be enforceable in accordance with the terms of those leases. However, the same general compliance with law provisions which are sufficient to require compliance with the Curfew Ordinance for the airlines and Signature would also be sufficient to enforce the Curfew Ordinance for the existing FBOs.

/s/

WILLIAM F. SHERRY, A.A.E.

Director of Aviation

Please direct questions to William Sherry, Director of Aviation, at (408) 392-3611.